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# The Chilling Effect of Aggressive Police Responses to Peaceful Protests

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The Chilling Effect of Aggressive Police Responses to Peaceful Protests

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On October 26, 2020, the United States Senate voted to confirm then-Seventh Circuit Court of Appeals Judge Amy Coney Barrett to the Supreme Court of the United States.[1] This 52-48 vote fell almost completely on partisan grounds, becoming the first Supreme Court confirmation in modern times to receive no support from the minority party.[2]

Before being confirmed as the 115th Associate Justice to serve on the United States Supreme Court, then-Judge Barrett faced questioning from members of the Senate Judiciary Committee on her judicial philosophy and legal knowledge.[3] When responding to a question from Nebraska Sen. Ben Sasse asking her to name the five freedoms granted by the First Amendment of the United States Constitution, Judge Barrett faltered.[4]

While Judge Barrett successfully named freedom of speech, freedom of press, freedom of religion, and freedom of assembly, she required the assistance of Sen. Sasse to recall the freedom to protest.[5]

Unfortunately, like Judge Barrett, the Supreme Court has too forgotten about the constitutionally-protected freedom to protest, or redress. For years the Court has declined to hear cases in which the freedom of protest is at issue.[6] This judicial silence has allowed law enforcement to employ excessive, dangerous practices to police peaceful protests, [7] ultimately endangering the life and safety of Americans doing nothing but putting their First Amendment right to practice.[8]

The First Amendment states, "Congress shall make no law . . . prohibiting. . . the right of the people . . . to petition the Government for a redress of grievances." [9] The Founders strongly believed that collective speech through protest or demonstration could be far more effective than individual speech when demanding government action.[10] By giving the right to protest its independence within the First Amendment, separate from the more-popular freedom of speech, the Founders granted the Supreme Court autonomy to fashion legal principles to safeguard it against unlawful government interference. [11]

Time-after-time the Supreme Court has disregarded this responsibility. To remedy this neglect, the Court should not only hear cases alleging violations of an individual's right to protest, but also apply the chilling effect doctrine, a popular free speech protection, when deciding them.[12]

Formed by judicial opinions handed down throughout the McCarthyism Era,[13] the chilling effect doctrine analyzes whether the “fear of government punishment can deter free expression as strongly as application of actual punishment.”[14] Courts have frequently held that statutes that promote self-censorship out of fear of government reprisal, will likely have a chilling effect on self-expression assured by the First Amendment.[15]

In *Baggett v. Bullitt*, the Supreme Court overturned two Washington state laws that required state employees, as a condition of their employment, to swear that they were both loyal to the United States, and not a seditious individual.[16] While neither statute directly reprimanded individuals for their beliefs,[17] the Court held that the language of both laws were overly vague and unduly broad.[18] “[T]he vice of unconstitutional vagueness is further aggravated where, as here, the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution.”[19]

The Supreme Court fashioned the chilling effect doctrine as a defense against “government crackdown” on both the communist and civil rights movements.[20] Shouldn’t the Court extend this free speech protection to an analogous “government crackdown” on today’s protests?[21] Lower courts have continuously refused this application, rebuffing claims that aggressive behavior from law enforcement will negatively affect future protest participation.[22]

However, being assaulted by a police officer, while participating in a peaceful protest, will *undoubtedly* accomplish this. Just last summer, protestors marching against police brutality throughout the country were met with pepper spray, tear gas, punches, and kicks by members of law enforcement.[23] In Michigan, a member of the Detroit Police was charged with three counts of felonious assault after needlessly shooting photojournalists with rubber pellets.[24] Recently, independent expert review of law enforcement responses have shown “a willingness by police to escalate confrontations.”[25]

The Supreme Court’s refusal to hear cases concerning the right to protest has resulted in “an increasingly stronger show of force [by law enforcement].”[26] The only way to ensure the safety of Americans, as well as the First Amendment freedoms they cherish, is to expand the chilling effect doctrine to the right to protest.

[1] Nicholas Fandos, *Senate Confirms Barrett, Delivering for Trump and Reshaping the Court*, N.Y. Times (Oct. 26, 2020), <https://www.nytimes.com/2020/10/26/us/politics/senate-confirms-barrett.html> (<https://www.nytimes.com/2020/10/26/us/politics/senate-confirms-barrett.html>).

[2] Lisa Mascaro, *Barrett Confirmed as a Supreme Court Justice in Partisan Vote*, Associated Press (Oct. 27, 2020), <https://apnews.com/article/election-2020-donald-trump-virus-outbreak-ruth-bader-ginsburg-amy-coney-barrett-82a02a618343c98b80ca2b6bf9eafe07> (<https://apnews.com/article/election-2020-donald-trump-virus-outbreak-ruth-bader-ginsburg-amy-coney-barrett-82a02a618343c98b80ca2b6bf9eafe07>).

[3] Fandos, *supra* note 1.

[4] Nicholas Reimann, *Amy Coney Barrett Forgets Right to Protest is a First Amendment Freedom*, Forbes (Oct. 14, 2020), <https://www.forbes.com/sites/nicholasreimann/2020/10/14/amy-coney-barrett-forgets-right-to-protest-is-a-first-amendment-freedom/?sh=28ab366312ed> (<https://www.forbes.com/sites/nicholasreimann/2020/10/14/amy-coney-barrett-forgets-right-to-protest-is-a-first-amendment-freedom/?sh=28ab366312ed>).

[5] *Id.*

[6] See Kia Rahnama, *How the Supreme Court Dropped the Ball on the Right to Protest*, Politico (Aug. 17, 2020), <https://www.politico.com/news/magazine/2020/08/17/portland-crackdown-freedom-of-assembly-supreme-court-397191> (<https://www.politico.com/news/magazine/2020/08/17/portland-crackdown-freedom-of-assembly-supreme-court-397191>).

[7] *Id.*

[8] See, e.g., Talia Buford, Lucas Waldron, Moiz Syed & Al Shaw, *We Reviewed Police Tactics Seen in Nearly 400 Protest Videos. Here’s What We Found*, ProPublica, (July 16, 2020), <https://projects.propublica.org/protest-police-tactics/> (<https://projects.propublica.org/protest-police-tactics/>); Reuters Staff, *Detroit Officer Charged with Shooting Journalists with Rubber Pellets*, Reuters (July 21, 2020), <https://www.reuters.com/article/us-global-race-detroit/detroit-officer-charged-with-shooting-journalists-with-rubber-pellets-idUSKCN24M2O8> (<https://www.reuters.com/article/us-global-race-detroit/detroit-officer-charged-with-shooting-journalists-with-rubber-pellets-idUSKCN24M2O8>).

[9] U.S. Const. amend. I

[10] Rahnama, *supra* note 6.

[11] See *id.*

[12] *Id.*

[13] Ashley M. Eick, *Forging Ahead from Ferguson: Re-Evaluating the Right to Assemble in the Face of Police Militarization*, 24 Wm. & Mary Bill Rts. J. 1235, 1244 (2016).

[14] Rahnema, *supra* note 6.

[15] *Id.*

[16] *Baggett v. Bullitt*, 377 U.S. 360, 361–63 (1964).

[17] Rahnema, *supra* note 6.

[18] *Baggett*, 377 U.S. at 366.

[19] *Id.* at 372 (citing *Cramp v. Bd. of Pub. Instruction of Orange Cnty., Fla.* 368 U.S. 278, 287 (1961)).

[20] Eick, *supra* note 13.

[21] *Id.*

[22] Rahnema, *supra* note 6.

[23] Buford, Waldron, Syed & Shaw, *supra* note 8.

[24] Reuters Staff, *supra* note 8.

[25] Buford, Waldron, Syed & Shaw, *supra* note 8.

[26] Rahnema, *supra* note 6.

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